

BEFORE THE
SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

ROBERT and LEE PROPST,
ROBBIE' S. HACK,
PATRICIA BREWIN and
HUGH and MARY BUTLER,

Appellants,

v.

KING COUNTY and BERNARD
NORQUIST,

Respondents.

SHB Nos. 86-18 and 86-19

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER

This matter, the appeal of the granting of a shoreline substantial development permit for construction of an access road on shorelines of Lake Sammamish, came on for hearing in Redmond, Washington on September 15, 1986, before Board Members Wick Dufford (presiding), Lawrence J. Faulk, Rodney Kerslake, Nancy Burnett and Steve Morrison. The proceedings were recorded by Cheri L. Davidson of Gene Barker and Associates.

1 Appellants Hugh and Mary Butler were represented by Michael
2 McGrorey of Hight & Green; Robert and Lee Propst, Robbie S. Hack and
3 Patricia Brewin were represented by Linda Youngs of Davis, Wright &
4 Jones; Respondent Bernard Norquist was represented by Michael Rodgers
5 of Morris and Rodgers.

6 Witnesses were sworn and testified. Exhibits were admitted and
7 reviewed. Arguments of counsel were received. The Board viewed the
8 site. From the testimony, exhibits and argument, the Shorelines
9 Hearings Board makes these

10 FINDINGS OF FACT

11 I

12 Along the east shore of Lake Sammamish, near the northern end of
13 the lake, are four private parcels whose owners are involved in a
14 neighborhood dispute. These parcels lie in a row along the
15 waterfront. The southerly lot belongs to appellants Propst.
16 Appellants Brewin and Hack have shore access rights over this lot.
17 The next lot north is owned by several persons, called the Lake
18 Sammamish Preservation Group. Appellants Butler are among the members
19 of this group. The third lot to the north is owned by respondent
20 Norquist. The northernmost lot is owned by appellants Butler.

21 The north-south dimension of this stretch of waterfront is divided
22 approximately as follows: Propst-100 feet; Group-100 feet;
23 Norquist-50 feet; Butler-500 feet. The east-west dimension of uplands
24 on these lots varies with the natural contour of the shore, in some
25 places measuring somewhat more than 50 feet, in others somewhat less.

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1 The landward or eastern boundary of all the lots is a straight
2 line abutting property of the Burlington Northern Railroad.
3 North-south running railroad tracks are located approximately 50 feet
4 inland from this boundary. Another 50 feet east and upslope is East
5 Lake Sammamish Parkway.

6 II

7 The overall picture is of a narrow strip of private land along the
8 lake, hemmed in by the highway and railroad. This strip is too narrow
9 to be readily amenable to permanent residential development in any
10 instance. The lots, therefore, are used solely for recreational
11 purposes. The use is primarily confined to the warm summer months.

12 III

13 No public road serves the lots. A private access way from East
14 Lake Sammamish Parkway leads across the railroad tracks to the north
15 end of the shoreline strip. From this point, the access way turns
16 south and leads down the eastern boundary of the properties.

17 Until recently the north-south course of the access way was a
18 meandering one. At some points the path wandered onto the railroad's
19 land, at some points it was on the adjacent shorefront lots, and in
20 places it straddled the line.

21 The Burlington Northern, by agreements with the shorefront owners,
22 permits the use of the most westerly 10 feet on its property for their
23 ingress and egress. These agreements are revocable on thirty days
24 notice.

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1 IV

2 On or about March 14, 1985, an access way construction project was
3 undertaken by respondent Norquist. At a cost of around \$4,300 he
4 caused a straight road to be built to his parcel along the easterly 15
5 feet of the Butler's property to his north. This project coincided
6 with the pre-existing access way in part and diverged from it in
7 part. No permits were obtained prior to the construction.

8 V

9 Complaints to the County led to an inspection of the project by a
10 member of its shoreline planning staff on March 22, 1985. By then the
11 project had already been completed. The inspector concluded that the
12 work was not simply routine maintenance of an existing development,
13 but involved sufficient new construction to require a shoreline
14 substantial development permit. The matter was referred for code
15 enforcement and some months of correspondence and other communication
16 ensued. Eventually on December 5, 1985, Mr. Norquist filed an
17 application for a substantial development permit accompanied by a
18 completed environmental checklist. The site is in an environment
19 designated as Conservancy under the King County Shoreline Master
20 Program.

21 VI

22 A determination of non-significance (DNS) was issued and posted at
23 three locations along the project route on January 7, 1986. A fifteen
24 day comment period was provided. The record discloses no comments on
25 the DNS.

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VII

On April 7, 1986, the County approved Norquist's application (No. 054-85-SH), subject to conditions. Included were the following:

5. Roadway width and drainage control measures shall be 15 feet in total width.

6. Drainage control of roadway runoff shall be accomplished by ditches or berms placed adjacent to the roadbed. Runoff from upland areas shall be intercepted and diverted under the roadbed via culverts. Culverts shall terminate in areas where existing vegetation and soil conditions prevent erosion.

7. All disturbed areas adjacent to roadbed and all areas where the former roadbed existed shall be hydroseeded and mulched. All open areas associated with the new or old road shall be planted with native tree species 6 to 8 feet on center.

8. All slash or debris along existing or former roadway shall be removed prior to hydroseeding, mulching, and replanting.

The request for review of Propst, Hack and Brewin was filed on May 6, 1986, and became our SHB No. 86-18. The Butler's appeal was received on May 8, and became our SHB No. 86-19.

VIII

The Norquists entered into a real estate contract for their parcel on May 10, 1976. They received their fulfillment warranty deed on March 1, 1983. The property description on both the contract and the deed reads:

That portion of the South 50 feet of the North 550 feet of Government Lot 4, Section 18, Township 25 North, Range 6 East, W.M. in King County, Washington, lying westerly of the Northern Pacific Railway right-of-way. Together with second class shorelands adjoining.

Together with an easement for ingress, egress and utilities over the easterly 15 feet of that portion of the North 500 feet of said Government Lot 4, lying westerly of said right-of-way.

1 Norquist's project was intended to occupy the 15 foot easement
2 described above. The Butlers, over whose parcel the easement is
3 purported to extend, contest its validity. At some point after
4 Norquist's road construction, the Butlers and others brought a suit in
5 Superior Court concerning use of the easement. An order was entered
6 in the cause on June 6, 1985, allowing continued use of the easement
7 by the Norquists for ingress and egress but otherwise restraining them
8 from trespass. At the time of hearing in the instant case this order
9 remained in effect.

10 IX

11 When the permit which is under appeal was issued in April of 1986,
12 King County was aware that there was a dispute over the easement, but
13 unaware that a suit concerning it had been filed.

14 In processing Norquist's application, the County accepted the
15 legal description (set forth above) which Norquist provided and did
16 not attempt to look behind it.

17 X

18 The original access way along the rear of the waterfront lots was
19 narrow, perhaps averaging 10 feet in width. It wound among trees and
20 undergrowth. From time to time gravel was placed on it, but in the
21 wet season it became muddy and difficult to traverse with vehicles.
22 In all seasons its width made access by large vehicles, such as motor
23 homes, a real challenge.

1 XI

2 The new straight access road is wider then the original pathway,
3 averaging around 15 feet in width. Its construction involved
4 clearing, grading and adding new gravel. The gravel ranges in depth
5 from 6 to 24 inches. At one point there is an 8 to 10 inch cut in the
6 uphill bank. The topography is, however, basically flat and cutting
7 and filling to produce a level grade is minimal.

8 XII

9 Except where cleared, the shoreline strip in question is covered
10 with ash, alder, cottonwoods and dense undergrowth. The Propst parcel
11 is left largely in its natural state. The Group's property and the
12 Norquist property retain significant vegetation but have been
13 extensively cleared. The southerly 100 feet or so of the Butler
14 property has also been extensively cleared, while the remainder of
15 that parcel remains basically natural.

16 The Norquist project post-dated the clearing which has occurred on
17 the various parcels. The project resulted in direct alteration of the
18 pre-existing environment primarily along its route. Several mature
19 trees wee removed, cut up and hauled away. The stumps were augered
20 out so that no remanants of the felled trees were left visible at land
21 surface.

22 XIII

23 The appellants contend that some debris from clearing for the road
24 was left piled on their properties. Respondent asserts that any
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debris left on neighboring properties is the product of previous clearing projects.

We believe that the debris piles, more likely than not, involve both old and new materials. The quantities involved, in any event, are not substantial. We note that the natural processes of growth are rapidly tending to camouflage such debris as remains.

XIV

The landscape slopes upward inland from the easterly boundary of the shoreline strip. Water drains off the slope across the shoreline properties into the lake. A drainage ditch along the railroad tracks discharges through a 15 inch drain pipe at a point east of the access road opposite Butler's parcel. Before Norquist's construction, the runoff from this pipe flowed in a sheet northerly down the access way about 60 feet before ponding on the east side. The ponded water then eventually overflowed the road, flowing across it in a sheet toward the lake.

After Norquist's project the movement of water discharged by the drain pipe is essentially the same as before. However, the ponding has been exacerbated because the new road acts as a small dam at the ponding area. A six-inch PVC pipe placed under the new roadway near the outlet of the railroad drain pipe does not successfully function to carry off the discharge.

Winter passage over the new road is probably easier than formerly because it is less muddy.

XV

We find that there are no significant adverse effects to the public health, the land, its vegetation and wildlife or to the waters of the state from the Norquist project as constructed. Such negative environmental effects as there are would be substantially mitigated, we find, by compliance with the conditions the County has inserted in the permit.

Pending the appeal, the permit's conditions remain unfulfilled. We are unpersuaded, however, that they could not in a physical sense, successfully be complied with.

XVI

Parts of the old access way remain. Convergence of the old and new is greatest along the Butler's property for the first 400 feet or so, and least for the last 100-150 feet. The new road connects to the old near its southern end so that the potential for vehicular access to the Propst and Group parcels has not been impeded by the project. We do not interpret condition 7 of the approved application (quoted in VII above) to require or allow any interference with connecting the new road with the old, or with maintaining that portion of the old road which now acts as an extension of the new.

XVII

Before and after pictures of the site reveal little, if any, ultimate adverse aesthetic impact from the project.

1 XVIII

2 Any Conclusion of Law which is deemed a Finding of Fact is hereby
3 adopted as such.

4 From these Findings of Fact the Board comes to these

5 CONCLUSIONS OF LAW

6 I

7 Appellants assert inadequacy of notice of the issuance of the
8 declaration of non-significance (DNS). They argue that posting the
9 notice on the property was, under the circumstances, legally
10 insufficient. The theory is that since the properties are primarily
11 used in the summer, posting in the winter was defective. We disagree.

12 WAC 197-11-510 specifically contemplates public notice by posting
13 on the property, for site-specific proposals. Since the DNS was
14 issued in January with a 15 day comment period, such posting could
15 properly have occurred in no other season. The property here is not
16 so remote or inaccessible in winter that on-site posting, pursuant to
17 the express terms of the State Environmental Policy Act rules, should
18 be considered legally infirm.

19 II

20 We conclude that the County was correct in determining that
21 Norquist's project did not have a probable significant adverse impact
22 on the environment, and hold, therefore, that issuance of the DNS was
23 proper. WAC 197-11-330. See Norway Hill Preservation and Protection
24 Association v. King County Council, 87 Wn.2d 267, 552 p.2d 674 (1976).

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III

We decide that the physical and aesthetic impacts of the Norquist project, as conditioned by the County, are not so adverse as to violate the policy of the Shoreline Management Act (SMA), set forth in RCW 90.58.020.

IV

The King County Shoreline Master Program (KCSMP) states that Conservancy areas "are intended to maintain their existing character". KCC 25.24.010. This general statement of purpose, however, is not a prohibition on all development, nor is road construction in such an area anywhere prohibited.

We conclude that the project in question is consistent with the existing character of the site and does not violate KCC 25.24.010.

V

The KCSMP contains specific criteria for filling and excavation in Conservancy areas. KCC 25.24.140. Nothing has been pointed out which shows a violation of any of these criteria, including those incorporated by reference. The assertion of a violation of KCC 25.24.140 is without merit.

VI

Appellants Butler argue that Norquist's application should be invalidated because, under the KCSMP, applications for substantial development permits are to be made "by the property owner, or by an authorized agent of the owner." KCSMP 25.32.030

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1 The County interprets this provision to allow applications by
2 those with a legal right to use property, including lessee's and
3 contract purchasers as well as owners in fee. The interpretation of
4 regulations by the entity which adopted them is entitled to great
5 weight, Yakima v. Civil Service Commission, 29 Wn. App. 765, 631 P.2d
6 400 (1981); and we concur in the interpretation adopted here.

7 For the purposes of administering its master program, we conclude
8 further, that the County may rely on the assertions of property
9 interest made by applicants. The County need not demand a title
10 report. Neither should it attempt to resolve disputes over property
11 interests of which it may become aware.

12 The Butlers question the validity of the easement the Norquists
13 claim across their property. In such a case, the County for
14 administrative reasons may wish to defer ruling on a shorelines
15 application, but it is not obliged by any provision of the KCSMP to do
16 so.

17 VII

18 RCW 90.58.140(2) states that a substantial development "shall not
19 be undertaken on shorelines of the state without first obtaining a
20 permit..." It is urged that the County's after-the-fact approval in
21 this case violates this provision and is therefore invalid. Again we
22 disagree.

23 The purpose of the permit requirement is to prevent developments
24 which are contrary to the SMA and its implementing master programs

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1 from coming into existence. However, when development has occurred
2 without benefit of the mandated pre-construction review, the question
3 is whether the project must be abated for non-conformity with the
4 substantive requirements of applicable shoreline law.

5 In such cases, post hoc permit review is the appropriate
6 approach. If, as here, there does not appear to be a problem with
7 substantive shorelines compliance, the provisions of RCW 90.58.140(2)
8 do not provide a basis for tearing a project out. To hold otherwise
9 would exalt procedure over substance for no compelling reason. We
10 believe the threat of possible abatement for non-consistency is a
11 sufficient deterrent to prevent wide scale flouting of the
12 pre-construction review requirement.

13 VIII

14 Our review convinces us that the action of King County in this
15 case should be upheld insofar as shorelines issues are concerned. We
16 are aware, however, that this result may not very much advance the
17 ultimate resolution of the neighborhood dispute. Unfortunately, the
18 potential for affirmance here made this foreseeable from the outset.

19 Neither the County nor this Board can quiet title to property in
20 this permit proceeding. The dispute over the validity of the easement
21 must be resolved in another forum.

22 Moreover, neither the County nor this Board can force any party to
23 acquiesce in the trespass of another on his property.

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What the County has done is delimit a project which would conform to the SMA and master program, if it could be accomplished as conditioned. Obviously, the conditions cannot be carried out absent some cooperation among neighbors. Other configurations and adjustments of conditions are possible through revision of the permit. But, unless some spirit of accommodation arises, non-compliance with the permit conditions will simply become a matter addressed to the enforcement discretion of the County.

IX

Any Finding of Fact which is deemed a Conclusion of Law is hereby adopted as such.

From these Conclusions the Board enters this

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ORDER

The decision of King county in approving Substantial Development Permit No. 054-85-SH, filed by Bernard Norquist, is affirmed.

DONE at Lacey, Washington, this 31st day of December, 1986

SHORELINES HEARINGS BOARD

Wick Dufford
WICK DUFFORD, Presiding

Lawrence J. Faulk 12/30/86
LAWRENCE J. FAULK, Chairman

Rodney M. Kerslake
RODNEY M. KERSLAKE, Member

Nancy R. Burnett
NANCY R. BURNETT, Member

Not Available for Signature
STEVEN M. MORRISON, Member

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